STATE OF MICHIGAN

COURT OF APPEALS

KASELITZ FAMILY LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

HUDSON AND MUMA INC.,

Defendant-Appellee.

UNPUBLISHED
February 19, 2004

No. 244382
Oakland Circuit Court
LC No. 01-034717-NO

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant in this action concerning plaintiff's coverage under an insurance policy. We affirm.

Plaintiff is a limited partnership, managed and operated by Julianna Kaselitz (Kaselitz). Plaintiff owns approximately twenty-four single-family homes in the city of Detroit that are utilized as rental properties. Because of increased premiums charged by her insurance carrier at the time, Kaselitz contacted Andrew Muma (Muma) of defendant agency and requested insurance quotes for the rental properties. Kaselitz requested that Muma get quotes for coverage similar to that which she had with her other carrier and she provided Muma with a list of the properties and the limits for each.[1]

Muma contacted Whitcomb & Company, Inc., a licensed surplus lines insurance licensee,[2] and requested a quotation. Whitcomb & Company responded with a quote that apparently advised the parties that the insurance would be procured through Nationwide Insurance Corporation. Thereafter, Kaselitz signed a Premium Finance Agreement and a Notification and Acknowledgment, and Whitcomb & Company issued a binder. Sometime between the time that plaintiff was issued the binder and the time that the actual written insurance policy was received, two of plaintiff's rental properties were damaged in separate fires.

[1] Plaintiff claims Muma actually advised Kaselitz to combine her liability and fire coverage under one policy.

[2] Surplus line insurance carriers are carriers that are neither chartered nor licensed to sell insurance in the state of Michigan. See Surplus Lines Insurance Act, MCL 500.1901 *et seq*.

Plaintiff apparently filed an insurance claim in excess of $38,000, but, for reasons not clear from the record, was offered only $850.

Because its claim was essentially denied, plaintiff filed suit against defendant alleging negligence and breach of contract.[3] Plaintiff claimed that defendant was negligent and breached an oral agreement to advise of and provide adequate insurance coverage for the properties, and otherwise failed to procure the agreed-upon insurance for the properties. Plaintiff also claimed that defendant failed to investigate the financial condition of Nationwide Insurance Corporation.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing it did not owe a duty to advise Kaselitz regarding the adequacy of the insurance policy because plaintiff could not establish the existence of a "special relationship" between the parties. Following a hearing, the trial court granted defendant's motion for summary disposition, finding that plaintiff had failed to establish the existence of a "special relationship" between the parties, which would give rise to a duty on the part of defendant to advise plaintiff of the adequacy of the coverage. The trial court also found that plaintiff had presented no evidence to support its allegations that defendant failed to procure the insurance requested.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding this motion, the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the documentary evidence presented shows that there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). On appeal, this Court reviews de novo the trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

Generally, "an insurance agent does not have an affirmative duty to advise a client regarding the adequacy of a policy's coverage. Instead, the insured is obligated to read the policy and raise questions concerning coverage within a reasonable time after issuance." *Bruner v League General Ins Co*, 164 Mich App 28, 31; 416 NW2d 318 (1987), citing *Parmet Homes v Republic Ins Co*, 111 Mich App 140, 144-145; 314 NW2d 453 (1981). In *Bruner*, this Court held that a duty to advise might arise when a "special relationship" exists between the insurance company or its agent and the policy holder, in which there is some type of interaction concerning the coverage and the insured relies on the expertise of the insurance agent to the insured's detriment. *Id*. at 32 (citations omitted). In *Harts*, *supra*, the Supreme Court modified this "special relationship" test so that "the general rule of no duty changes when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent,

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[3] We note that plaintiff did not bring suit against Whitcomb & Company or any particular insurance carrier.

though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured." *Id*. at 10.

Plaintiff argues on appeal that the "special relationship" test announced in *Bruner* and modified in *Harts* is not applicable in this case because defendant is an independent insurance agent. According to plaintiff, because defendant is an independent insurance agent, a duty to advise plaintiff of its insurance coverage arose by virtue of the principle-agent relationship that existed between plaintiff and defendant. Thus, plaintiff argues the trial court improperly granted summary disposition to defendant.

We acknowledge the existing case law that states that "ordinarily, an independent insurance agent or broker is an agent of the insured, not the insurer." *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995). Relying on this body of law, plaintiff asks us to find that because defendant is an independent insurance agent, a fiduciary relationship exists between plaintiff and defendant, and thus, the "no duty" rule "special-relationship" test established in *Bruner* and *Harts* does not apply. We decline to decide such in this case because even assuming defendant owed some sort of duty to plaintiff, plaintiff has failed to establish a breach of that duty.

Plaintiff presented no evidence to establish that defendant did not attempt to procure adequate insurance coverage, nor did it establish that the insurance defendant procured was not adequate. Plaintiff alleges that its insurance claims were denied almost in total. However, plaintiff presented no evidence concerning why total payment was refused. In essence, plaintiff failed to present any evidence of a breach on defendant's part.

The record demonstrates that defendant contacted Whitcomb & Company for an insurance quote and a policy was put into effect. The mere fact that plaintiff's claim was denied is not evidence that defendant breached any duty. Without evidence concerning why payment on plaintiff's claims was refused, there is nothing to establish a breach of any duty on the part of defendant. Accordingly, even assuming defendant owed some duty to plaintiff, summary disposition in favor of defendant was proper because plaintiff failed to present any evidence demonstrating that a breach of that duty occurred.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra